IN THE

Supreme Court of the United States.

October Term—1902.

No. 321.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY,

PLAINTIFF IN ERROR.

vs.

ANDREW HERMAN, a minor, by his next friend, Martin Herman, and the UNION TERMINAL RAILWAY COMPANY,

DEFENDANTS IN ERROR.

Reply Brief of Defendant in Error on Motion to Dismiss or Affirm.

I.

Plaintiff in error in his brief assumes that it appears from the record that upon the first trial in the state court plaintiff "failed to offer any evidence whatever against the resident defendant,"

and he now argues that this was a voluntary abandonment of any action against the resident defendant and that it amounts to the same as a voluntary dismissal.

We cannot permit this assumption to go unchallenged. None of the evidence offered appears in the record. Not one syllable. How, then, can this court, from the record here, determine how much or how little was in fact offered as against the resident defendant?

It is true plaintiff in error alleged in the second petition for removal that there had been no evidence offered to sustain a cause of action as against the resident defendant, but that was a mere assertion of a conclusion of fact and of law. The ruling of the court sustaining the demurrer was necessarily couched it the same language it would have been had plaintiff below offered the testimony of a dozen witnesses to prove liability against the resident defendant, provided the court considered the evidence insufficient. It cannot be assumed that because the court sustained the demurrer on the grounds that evidence offered was not sufficient that there was no evidence of any kind offered.

If there had been "no evidence whatever" offered as against the resident defendant, plaintiff in error should not have demurred to the evidence, but should have moved to dismiss, or for judgment

as to the resident defendant. On the contrary, read their "Demurrer to Evidence:"

"And now comes the defendant, The Union Terminal Railway Company, at the close of the evidence of the plaintiff, and demurs to the evidence for the reason that the same is not sufficient to establish a cause of action in favor of plaintiff and against the said defendant, The Union Terminal Railway Company." (Rec. p. 11.)

And then follows the ruling of the court:

"And now the arguments of counsel upon said demurrers are fully heard and the court being fully advised in the premises, sustains the said demurrer of the Union Terminal Railway Company and enters judgment in favor of said defendant and against the plaintiff for its costs, *to which ruling of the court the plaintiff at the time excepted.*" (Rec. p. 11)

There is no finding of the court that no evidence of any kind was introduced. The affidavit of counsel for plaintiff below explains why certain evidence relied upon was not in fact produced, clearly showing good faith on the part of the plaintiff below.

II.

We did not make this record and are not in any manner responsible for its failure to contain the evidence upon the first trial.

The fact is, plaintiff in error did not appeal from the first trial because it was a mis-trial. He

did appeal from the second trial, and the record here only shows the evidence upon the second trial. But he now complains of error occurring upon the first trial without any pretense of having a record of the evidence, the lack of which he says made the case then removable.

III.

The plaintiff below excepted to the ruling of the court sustaining the demurrer, and had the trial not resulted in a mis-trial, plaintiff below could have gone to the higher courts of the state upon that exception. This was insisting until the close of the trial upon the liability of the resident defendant, and this case is clearly within the scope of Whitcomb vs. Smithson, 175 U. S., 635.

Respectfully submitted,

SILAS PORTER,

W. B. SUTTON,

Attorneys for Defendant in Error.